85-1961 (1)

Supreme Court, U.S.
FILED
APR 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

EUGENE LESLIE,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether:

- when a federal prosecutor uses each and every one of his peremptory challenges to strike black jurors from a petit jury sitting in judgment on a black defendant, and
- thereby eliminates all blacks from the jury,

a federal district court has the authority and obligation under the supervisory power to inquire into the prosecutor's reasons for exercising his challenges in an apparently racially motivated way, and if the district court on inquiry finds impermissible racial motivation, to take steps to correct the abuse.

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Eugene Leslie, by his counsel Robert Glass, and co-counsel, Lolis Edward Elie, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming his judgment of conviction.

OPINIONS BELOW

The Fifth Circuit panel opinion, Judge Garwood dissenting, conditionally reversed petitioner's conviction. It is reported at

759 F.2d 366 (5th Cir. 1985), and reprinted as Appendix A. The en banc opinion of the Fifth Circuit, Judges Williams, Brown Rubin, Tate and Johnson dissenting, reversed the panel and affirmed petitioner's conviction. It is reported at 783 F.2d 541 (5th Cir. 1986), and is reprinted as Appendix B.

RULES AND STATUTES IMPLICATED

The rules and statutes implicated in petitioner's case, which are reprinted in the separately presented Appendix, are as follows:

- Rule 2, F.R.Cr.P. (Appendix C).
- Rule 24, F.R.Cr.P. (Appendix D).
- 28 U.S.C. §1861, et seq. (Federal Jury Selection and Services Act of 1968)(Appendix E).

JURISDICTION

The en banc decision of the United States Court of Appeals for the Fifth Circuit is dated February 20, 1986. This petition is timely, coming within 60 days of the en banc decision. Jurisdiction is present under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Eugene Leslie is a prominent fight promoter and trainer in the City of New Orleans; he is black. He was indicted and convicted in the United States District Court for the Eastern District of Louisiana for conspiracy to distribute and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(a)(1).

During jury selection the Assistant United States Attorney exercised each and every one of the six peremptory challenges permitted to him by Rule 24(b), F.R.Cr.P., against black veniremen. These six black

veniremen were the only blacks on the panel available for selection. Of the three veniremen from whom the alternate was to be selected, only one was black; the assistant exercised his single peremptory against the one black venireman.

Petitioner immediately moved for a mistrial, arguing that the pattern of the prosecutor's challenges indicated that they were racially motivated. Petitioner urged the trial court to invoke its supervisory power over the conduct of federal trials to grant his motion for mistrial. The prosecutor maintained that his actions were not racially motivated and that he was under no obligation to articulate his reasons for striking those particular jurors. He nevertheless offered to give the court an in camera explanation. The district court, however, declined to hear the prosecutor's reasons in camera or otherwise, stating that a prosecutor need not offer any explanation

for the manner in which he exercises his peremptory challenges.

On appeal petitioner reasserted his claim that a federal district court has the supervisory power to inquire into a prosecutor's motives for exercising peremptory challenges when on its face the pattern of strikes appears to be racially motivated. The original panel sustained that claim. It held that the trial court was obliged to exercise its inherent supervisory power to make inquiry into the prosecutor's motives for exercising his challenges; on remand, if the district court were to find that the prosecutor "exercised his peremptory challenges for impermissible, racially discriminatory reasons," a new trial would be ordered. On en banc rehearing, however, the Fifth Circuit reversed the panel decision and held that, absent a showing of systematic exclusion of blacks, it is a misuse of the supervisory

power to inquire into a prosecutor's reasons for peremptorily challenging veniremen.

REASONS FOR GRANTING THE WRIT

The question raised on these facts is whether federal judges have the power and obligation to mitigate the extreme result achieved by the prosecutor in this case in his efforts to convict a black man. The imminent decision in Batson v. Kentucky, S.Ct. No. 84-6263 (argued 12/12/85) will not resolve the supervisory question because this is a federal criminal case, not a state

criminal case.[1] In federal criminal cases, this Court's obligation is to assure not simply that trials are marginally constitutional (the standard for state cases), but that federal trials are truly fair and just, and as well appear to be fair and just. The Court's responsibility for racial fairness and racial justice in the federal system is more primary, compelling and organic than its general superintendence over the 50 states through the Fourteenth Amendment. If Batson is decided adversely to the state defendant's

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[1] Batson v. Kentucky, of course, involves only constitutional concerns and raises no federal supervisory power question. Batson therefore cannot control the outcome here. Because the Batson decision has not yet issued, however, petitioner cannot draw on the Court's analysis in that case insofar as it might bear on the arguments for or against application of the supervisory power. Petitioner is prepared to supplement his petition when Batson is decided, should the Court deem that course helpful or appropriate.

Petitioner notes, nonetheless, that he did reserve the constitutional claims raised in Batson. Should Batson be decided favorably to the state defendant, reversal of petitioner's conviction on constitutional grounds would necessarily follow.

constitutional claims, racial fairness in the federal system is still at risk and should not be left in unresolved limbo for the foreseeable future. The stakes are too great.

The en banc opinion of the Fifth Circuit held that as regards peremptory strikes the supervisory authority was no broader and extended no further than the constitutional principle applicable in both state and federal courts and expressed 21 years ago in Swain v. Alabama, 380 U.S. 202 (1965). This alleged analytical unity of the supervisory and constitutional powers derived from the appellate court's misguided application of and syllogistic adherence to two recently decided supervisory cases, United States v. Hasting, 461 U.S. 499 (1983) and United States v. Payner, 447 U.S. 727 (1980). As a consequence of this reasoning, the Fifth Circuit held that, absent a showing of systematic racial exclusion, the district court had no authority whatsoever to effect

any sort of judicial superintendence over a prosecutor's prima facie utilization of all of his peremptory challenges to eliminate all blacks from a jury, even in a case in which some cross-sectional input of the minority race affected both the appearance and the probable substance of jury fairness. Both the reasoning and the result were simply wrong, and the damage done to racial fairness and perceived justice immeasureable.

The supervisory power of federal courts to control their own proceedings has a long and distinguished history. It was first articulated as a basis for decision in McNabb v. United States, 318 U.S. 332 (1943). There, Justice Frankfurter wrote:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason, which are summarized as "due process of law" and below which we reach what is

> really trial by force.... Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

Id. at 340-341.

This Court has called upon its supervisory power in numerous cases. See, e.g., Jencks v. United States, 353 U.S. 657 (1975); Mesarosh v. United States, 352 U.S. 1 (1956); Ballard v. United States, 329 U.S. 187 (1946); and Thiel v. Southern Pacific Co., 328 U.S. 212 (1946). The supervisory power has in fact been invoked in such a wide range of circumstances that it has been said that "the sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum requirements of due process." Note, The Judge-Made Supervisory Power of the Federal Courts, 53 Geo. L. Rev. 1050 (1965).

Nowhere is the proper compass of the supervisory power more compellingly illustrated than in the contrasting decisions in Marshall v. United States, 360 U.S. 310 (1959) and Murphy v. Florida, 421 U.S. 794 (1975). In both cases jurors had been exposed to newspaper stories reporting that the defendant, who did not testify, had been convicted previously of serious offenses; in both cases the exposed jurors swore to the satisfaction of the judge that they would not be influenced by the newspaper articles and would decide the case only on the evidence. In Marshall, the Court reversed the federal defendant's conviction; in Murphy, the Court affirmed the state defendant's conviction. The only distinction was the differing roles played by the federal courts in federal and state adjudications. This Court reversed Marshall's conviction "'[i]n the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the

criminal law in the federal courts,' and not as a matter of constitutional compulsion.... We cannot agree that Marshall has any application beyond the federal courts." Murphy, supra, 421 U.S. at 797-798.

A similar pair of contrasting jury fairness cases is Aldridge v. United States, 283 U.S. 308 (1931) and Ristaino v. Ross, 424 U.S. 589 (1976). In both cases the black defendant was accused of killing a white police officer. In both cases the defendant requested, but was refused, voir dire examination directed to racial prejudice. This Court reversed the conviction of the federal defendant in Aldridge; it affirmed the conviction of the state defendant in Ristaino. The distinction again was the difference between constitutional and supervisory superintendence:

> Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions

> designed to identify racial prejudice if requested by the defendant. **Under our supervisory power we would have required as much of a federal court faced with the circumstances here.**
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> Ristaino, 424 U.S. at 597, n. 9.

That Swain held racist peremptory challenges constitutional is thus plainly no answer to the question whether a federal court should attempt to effect some moderating influence on the practice by resort to its authority[2] in "the formulation and application of proper standards for the

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[2]See Cuyler v. Sullivan, 446 U.S. 335 (1980) where this Court held, with regard to possible conflicts of interest by counsel in the representation of multiple defendants, that (446 U.S. at 346) --

> nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case;

while noting approvingly (446 U.S. at 335, n. 10) that --

> several [federal] Courts of Appeals already invoke their **supervisory power** to require similar inquiries.

enforcement of the federal criminal law in the federal courts." McNabb, supra. The values underlying equal protection and cross-sectional representation of juries are at war with racially motivated challenges. The supervisory power can and should be applied to inhibit invidious discrimination, for to do so serves the constitutional principles of equal protection and cross-sectional representation, even if the constitutional principles themselves and by their own force do not require such action.

There are two parts to the question whether a court should exercise its supervisory authority where prosecutors, by racist utilization of peremptory challenges, undermine our fundamental commitment to racial fairness and cross-sectional values: (a) whether there is a recognizable evil which is insulated (and thereby encouraged) by the tradition of exercising peremptories without judicial inquiry or review, and therefore

warrants exposure to daylight; and (b) whether there is a reasonable and practical way to moderate that evil without destroying the salutary and important uses of the peremptory.

A. Racist Utilization of Peremptory Challenges is Unquestionably Pernicious and Evil in Federal Criminal Trials.

The evil is there, unmistakable and palpable.[3] The fact that, in the 20 years following Swain, the racial use of peremptories continues to raise its ugly head with frequency in federal courts attests to the

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> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a... jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the judicial process. The exclusion of Negroes, or any other gruop otherwise qualified to serve, impairs the confidence of the public in the administration of justice.
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> Rose v. Mitchell, 443 U.S. 545, 555-556 (1979).

persistence of the problem. If a particular federal prosecutor harbors an unremitting and racist hostility towards blacks, and in the service of his racism, systematically exercises his peremptory strikes against blacks whenever it is practicable to do so, would this Court hesitate to condemn the practice -- if only it were revealed? If a federal prosecutor believes that all blacks are uneducated and stupid, and for that reason uses each and every one of his challenges to strike each and every black on a particular panel, would this court blink for a hesitant second before saying that the federal system should not tolerate such conduct in its prosecutors -- if it knew about it? If a federal prosecutor were so narrow and prejudiced as to believe that all blacks were addicts or drug users, could not be trusted to follow the law in drug prosecutions, and so should be struck whenever possible, would not this Court want to act to

stop the prosecutor -- if he were found out? Even if the federal prosecutor who hated blacks struck them wherever and whenever he could for the rational reason that his hatred could not be masked from black jurors (thus diminishing his credibility), would this Court encourage him to persist in his practice -- if the Court could discover the truth about him and deter him?

Prosecutors like those described above, who choose juries in those ways, are perpetuating an evil that no theoretically legitimate use of the peremptory challege could justify. Prosecutors like this exist, in greater or lesser degree, throughout the federal districts.[4] Yet, under the Fifth Circuit's ruling, such prosecutors will never be revealed, and their practices will not be deterred even minimally by the embarassment

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[4]See cases cited in McCray v. Abrams, 750 F.2d 113, 1120 at n. 2 (2nd Cir. 1984), cert. pending, S.Ct. No. 84-1426.

that the mere demand for explanation would necessarily cause.

B. The State Experience Since Swain Demonstrates that there is a Reasonable and Practical Way to Minimize the Evil of Racist Strikes by a Federal Prosecutor.

There simply exists no reason whatsoever to deny the federal courts the supervisory power to make a minimal inquiry of prosecutors whose strikes raise the racist spectre. Even authors who advocate only limited use of the power accept the propriety of its application to situations where the reliability and integrity of the judicial process is brought into question. See, e.g., Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1520 (1984).

It is clear, moreover, that a limited modification of the peremptory practices of prosecutors is feasible. The experience in

California following People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)[5] and in Massachussetts following Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. den., 444 U.S. 881,[6] and the decisions by Florida[7] and New Jersey[8] to follow suit, demonstrate not

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[5]People v. Hall, 197 Cal.Rptr. 71, 35 Cal.3d 1161, 672 P.2d 854 (1983); People v. Allen, 152 Cal.Rptr. 454, 23 Cal.3d 286, 590 P.2d 30 (1979); People v. Harvey, 208 Cal.Rptr. 910 (1984); People v. Alexander, 205 Cal.Rptr. 387 (1984); People v. Walker, 205 Cal.Rptr. 278 (1984); People v. Clay, 153 Cal.App.3d 433, 200 Cal.Rptr. 269 (1984); People v. Fuller, 136 Cal.App.3d 403, 186 Cal.Rptr. 283 (1982); People v. Coleman, 174 Cal.Rptr. 756 (1982); People v. Lucero, 160 Cal.Rptr. 27 (1979).

[6]Commonwealth v. Benbow, 16 Mass.App. 970, 452 N.E.2d 1164 (1983); Commonwealth v. DiMatteo, 12 Mass.App. 547, 427 N.E.2d 754 (1981); Commonwealth v. Brown, 11 Mass.App. 228, 416 N.E.2d 218 (1981); Commonwealth v. Kelly, 10 Mass.App. 847, 406 N.E.2d 1327 (1980).

[7]State v. Neil, 457 So.2d 481 (S.Ct. Fla. 1984).

[8]State v. Gilmore, 489 A.2d 1175 (N.J. Super. Ct. 1985); see also, the New Mexico decision, State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980), and the Second Circuit decision, McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984)(petition for certiorari pending).

only that it is possible to devise workable rules for examining the prima facie racial use of peremptories but that it is possible to do so without destroying the function and efficacy of peremptories in the totality of jury selection. Indeed, since Swain was decided in 1965, this Court has had the benefit of "the various States...serv[ing] as laboratories" for refinement of the principle of limited intervention in extreme, racially skewed jury situations. McCray v. New York, 461 U.S. 961 (1983)(concurrence of Justice Stevens on denial of certiorari). Where in 1965 even a limited inquiry, like that designed by the Fifth Circuit panel here, might be said to have "entail[ed] a radical change in the operation of the challenge," Swain, 380 U.S. at 222-223, this is no longer so. The peremptoriness of the challenge is no longer considered absolute throughout the land, nor is the desirability for absolute deference any longer clear.

C. The Fifth Circuit Decision Relies on Distinguishable Supervisory Power Decisions, and Improperly Defers to Inapplicable Rules and Legislation.

In holding the federal courts impotent to unveil racist practices and so to create the factual predicate for even limited remedial action, the Fifth Circuit relied heavily on two recent supervisory power cases, United States v. Hasting, 461 U.S. 499 (1983) and United States v. Payner, 447 U.S. 727 (1980). Payner and Hasting, however, spoke to a very different application of the supervisory power than that urged here. In those cases the appellate courts had taken it upon themselves to fashion additional supervisory remedies for constitutional violations (which they found in those cases to be particularly egregious and extreme), even though this Court had already placed limits upon the remedies to be available for dealing with violations of those same constitutional

provisions. The point here, however, is not additional remedies for constitutional violations. The point is that even though there may be no constitutional violation at all, the supervisory power may still provide a remedy for what is unfair but not unconstitutional. Such is the teaching of the contrasting Murphy-Marshall and Ristaino-Aldridge decisions, supra, text at 21-24.

In Payner the district court disregarded the exclusionary rule's requirement of standing to complain and refused to admit evidence which had been seized in deliberate violation of a third party's Fourth Amendment rights. In Hasting the court of appeal found that the prosecutor's closing argument constituted an impermissible comment on the defendant's exercise of his Fifth Amendment privilege against self-incrimination and reversed the defendant's conviction without regard for the harmless error rule. In reversing both Payner and Hasting, this Court

held that the lower appellate courts had improperly applied their supervisory power by disregarding limits on remedies which the Court, with careful consideration of the competing interests, had already decreed were adequate over the entire spectrum of Fourth and Fifth Amendment violations. The particular forms of remedies for constitutional violations were not themselves of constitutional origin or compulsion. Having designed adequate remedies and thus having drawn already the balance between greater and lesser possible remedies, the supervisory approach to the violations, no matter how offensive the violations were, was deemed neither necessary nor appropriate.

Not so here. Under the hegemony of Swain, there is no constitutional remedy for racist behavior by a prosecutor in striking black jurors in the particular case. The prohibitions imposed by Payner and Hasting on expanding remedies for constitu-

tional violations under the supervisory power simply do not apply to situations were there are no preexisting constitutional violations. The Fifth Circuit's decision fails to heed this distinction and thereby obscures the import of the Court's holdings in Payner and Hasting; consequently, that court has applied a plainly incorrect analytical framework to deny the availability of the supervisory power in the racial peremptory context.

Moreover, the Fifth Circuit improperly found that its hand had been stayed in the area of peremptory challenges by reason of Rule 24(b), F.R.Cr.P., and the Federal Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §1861, et seq. The rule and the statute require no deference because neither of these enactments even remotely instructs a federal court whether or not it may inquire into a prosecutor's motives for striking all of the blacks from a jury panel. The Fifth Circuit's reliance on Palermo v.

United States, 360 U.S. 343 (1959)[9] therefore, is totally misplaced.

Rule 24(b) speaks only to the number of peremptory challenges. It does not go further and define what is meant by "peremptory," whether peremptories might not be subject to limited review and supervision by the court, nor whether further there might not be some point beyond which the exercise of peremptories passes beyond arbitrary into intolerable. The fact is that Congress has never legislatively defined what a peremptory challege in the federal system is.

The conclusion that Rule 24(b) has no substantive preemptive content is fortified by reference to subsection (a) of Rule 24. Rule 24(a) specifies wno may conduct voir dire, and if the judge chooses to do so, how supplemental questions by the parties are to

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[9] "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant act of Congress." 360 U.S. at 353, n. 11.

be asked to the jurors. Under the Fifth Circuit's logic, Congress has "legislated" in the area of voir dire just as it has "legislated" in the area of peremptory strikes; accordingly, the supervisory power could not be invoked in either circumstance. This, however, is clearly not so because the supervisory power of this Court has in fact been applied to require voir dire questions of a particular sort. Aldridge v. United States, 282 U.S. 308 (1931)(question on racial prejudice required under supervisory authority, though not under the constitution).[10]

The Fifth Circuit's reliance on the Federal Jury Selection and Service Act of 1968 is similarly misplaced. The primary function of that enactment was to prevent discrimination in the panel; thus, the Act

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[10]The Court more recently reaffirmed this requirement in federal criminal trials in Ristaino v. Ross, 424 U.S. 589, 597, n. 9 (1976).

focuses on the means for compiling jury lists and on juror qualifications, and provides an "exclusive" mechanism for challege which shuts down once "voir dire examination begins." 28 U.S.C. §1867(a). Peremptory challenges and challenges for cause are mentioned only incidentally, and are reaffirmed as operating outside of the Act as "provided by law."[11] In other words, the Act says nothing at all substantive about the law, the practice or the outer limits of the peremptory challenge.

Insulating prima face racial strikes from court superintendence promotes both the appearance of unfairness and its fact. The government's peremptory strikes are provided for in Rule 24, F.R.Cr.P., and neither their

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[11]Subsections (3) and (4) of the proviso in 18 U.S.C. §1866(c) specify "[t]hat any persons summoned for jury service may be... (3) excluded upon peremptory challege as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by a party for good cause shown...."

origin nor their sanctity are constitutionally derived. See Swain, 380 U.S. at 211-217. The government's strikes, therefore, should be governed by Rule 2 of the same Federal Rules of Criminal Procedure. Rule 2 provides in relevant part that the rules "shall be construed to secure...fairness in administration" and "are intended for the just determination of every criminal proceeding." This is nothing if not a statement of supervisory power and authority. Here, then, is an explicit source for the supervisory power and authority of the federal courts to moderate the invidious, perniciously evil use of peremptory challenges by government counsel in racially despicable and condemnable ways.

CONCLUSION

For the reasons stated, petitioner respectfully petitions this Court to grant a writ of certiorari to review the decision of

the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert Glass, a member of the bar of this Court, hereby certify that copies of this petition for certiorari have been served on respondent, United States of America, by mailing three copies thereof, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, and three copies to John Volz, Esq., U.S. Attorney, 500 Camp Street, New Orleans, LA 70130, this ____ day of April, 1986.

_____

ROBERT GLASS